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No. 90-877

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM DEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are immune from prosecution for treatment, storage and disposal of hazardous waste in violation of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d)(2)(A), on the ground that the offenses occurred in the course of their work as federal employees.

2. Whether the district court was required to instruct the jury that petitioners could be found guilty only if they knew that treating, storing or disposing of hazardous waste without a permit could give rise to criminal liability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xxxii) is reported at 912 F.2d 741.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1990. The petition for a writ of certiorari was filed on December 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who held civilian positions in the United States Army's chemical weapons program, were convicted of knowingly treating, storing and disposing of hazardous wastes without a permit, in

violation of Section 3008(d)(2)(A) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928(d)(2)(A). The district court suspended imposition of sentence, placed petitioners on three years' probation, and ordered each to perform 1,000 hours of community service. The court of appeals affirmed.

1. Congress enacted RCRA to combat widespread problems associated with improper disposal of hazardous wastes. Congress recognized that if not disposed of properly, "hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976). Under RCRA, no hazardous waste may be treated, stored, or disposed of except at a facility where those activities are authorized by permit. 42 U.S.C. 6925(a).

Petitioners worked in the Chemical Research, Development and Engineering Center (CRDEC), an organization engaged in military research at the Army's Aberdeen Proving Ground (APG) in Maryland. C.A. Supp. App. 14. Petitioner Dee headed a branch of CRDEC known as the Munitions Directorate. Petitioner Lentz, who reported to Dee, headed a division within the Directorate that was responsible for developing production facilities for certain chemical weapons. Petitioner Gepp, who reported to Lentz, managed the Pilot Plant, a research facility that included a four-story laboratory, an administration building, and a number of storage sheds. *Id.* at 309, 521-524. A separate complex, known as the Old Pilot Plant, was used by CRDEC for research operations until 1978 and for storage after that date. *Id.* at 458. All three petitioners are chemical engineers by training. Tr. 3586-3589, 3762, 3951; Pet. App. iii-iv.

APG obtained all environmental permits for activities conducted by its tenant organizations, including CRDEC. RCRA permits issued to APG in 1981 and 1985 identified sites where designated hazardous wastes could be stored and incinerated. Neither the Pilot Plant nor the Old Pilot Plant was among those sites. Each tenant organization at APG, including CRDEC, was responsible for proper management of its own wastes in accordance with the APG's permit and all other applicable restrictions. C.A. App. 228-229; C.A. Supp. App. 15-17; Pet. App. v.

In 1982, the Army issued APG Regulation 200-2 (APG 200-2), which set forth procedures for all APG tenant organizations to follow in treating, storing, and disposing of solid and hazardous wastes. See C.A. App. 1227-1245. It required compliance with all federal, state, and local laws and regulations and contained specific references to RCRA and implementing regulations. *Id.* at 1228. In 1984, CRDEC issued CRDC 710-1, a regulation setting forth mandatory CRDEC procedures for management of laboratory chemicals and chemical wastes. C.A. App. 1268-1272. This regulation required CRDEC personnel to maintain accurate inventories of chemicals regulated under RCRA and to follow the disposal procedures specified in APG 200-2 for chemical wastes. "As heads of their respective departments, [petitioners] were responsible for ensuring that the provisions of APG 200-2, [CRDC] 710-1, and RCRA were fulfilled within their departments, and that their subordinates were aware of and in compliance with those regulations." Pet. App. vii.

2. Petitioners were indicted on four counts of violating Section 3008(d)(2)(A) of RCRA. C.A. App.

1-11, 111-120. The jury returned a total of seven convictions on those counts.[1]

a. Petitioners Lentz and Gepp were convicted under Count One of illegally storing and disposing of dimethyl polysulfide. This chemical, classified as a hazardous waste by virtue of its low ignition temperature, had been produced at the Pilot Plant and purchased from outside vendors for a weapons program that was cancelled in 1981. Thereafter, the fourth floor of the main Pilot Plant building was used to store drums of dimethyl polysulfide that were left over from the project, along with 200 canisters shipped from another installation after developing leaks. In May 1983, a safety inspector warned Lentz and Gepp that the Pilot Plant's roof might collapse and that they should move the dimethyl polysulfide, but no action was taken. In September 1983, part of the roof did collapse, crushing several drums and spilling their contents into floor drains. Employees repeatedly complained to Lentz and Gepp about the odor of the spilled chemical, but they took no action until the spring of 1984, when Gepp directed employees to move the drums outside and complete the paperwork for disposal. Pet. App. xvii-xx.

b. Gepp was also convicted under Count Two of storing and disposing of hazardous wastes at the Pilot Plant without a permit. This charge was based on the handling of a wide range of wastes, including numerous samples left over from a project to develop a Coast Guard manual for responses to spills of hazardous chemicals. In 1978, at Gepp's instruction, con-

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[1] A fifth count charged petitioners with violating the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* The jury could not reach a verdict on that count. Pet. App. iv n.5.

tainers of samples were moved into an outbuilding. C.A. App. 319-320. Gepp disregarded or responded inadequately to repeated warnings that leaks from the containers were creating a hazard. Outdated and excess chemicals were also stored at other locations in the Pilot Plant complex, and APG safety inspectors issued repeated notices of violation concerning improper chemical storage there. *Id.* at 433-444, 449-452; C.A. Supp. App. 66-69. In 1986, the CRDEC Commander ordered a halt to operations at the Pilot Plant and a complete cleanup. Cleanup personnel found unlabelled and improperly stored chemical containers throughout the Pilot Plant. Fumes from leaking chemicals in the outbuilding forced cleanup personnel to wear breathing equipment for this part of the job. C.A. App. 722-726. A number of chemicals were considered too unstable to be transported and were taken to an open field and destroyed by detonation. C.A. Supp. App. 34-37, 403-405. Hundreds of other chemicals were taken from the Pilot Plant to the APG hazardous waste storage facility. Pet. xxiii-xxv.

c. Lentz and Gepp were convicted under Count Three of knowingly treating and disposing of hazardous wastes at the Pilot Plant without a permit, based on three types of activities. First, the incinerator was used to burn a hazardous waste, methyl chloride. C.A. Supp. App. 32-33, 363. Second, at Gepp's direction, sumps on the Pilot Plant's first floor were repeatedly used as repositories for large quantities of waste chemicals, including a number of hazardous substances, C.A. App. 508-510, 527-531, 648-650; the sumps were periodically emptied into outside tanks, which were part of a "neutralization" system that was capable, at most, of adjusting the

acidity or alkalinity of liquid wastes. Pet. App. xxvii & n.15. Finally, Gepp and Lentz directed employees to clean drums used to store hazardous chemicals by dumping the remaining contents and rinsing agents on the ground outside the Pilot Plant. *Id.* at xxvi-xviii.

d. Petitioners Dee and Lentz were convicted under Count Four of knowingly storing or disposing of hazardous wastes at the Old Pilot Plant between June 1983 and August 1986. That facility had been used for small-scale laboratory experiments until it was closed in April 1978. From 1981 through 1983, the CRDEC Safety Office issued repeated warnings that improper storage of waste chemicals at the Old Pilot Plant posed a severe safety hazard. In 1983, Lentz directed a CRDEC employee to develop a cleanup plan for that facility, in accordance with APG regulations. Although many chemical wastes were taken to the Pilot Plant under the plan, others remained at the site until 1986. At trial, Dee and Lentz admitted that they were aware of the storage problems at the Old Pilot Plant, although they disagreed with the Safety Office's assessment that the wastes presented a hazard. Tr. 3687-3691, 4007-4008, 4015, 4021-4023. Manifests completed for disposal of the wastes indicated that many were covered by RCRA. C.A. App. 565-566; see Pet. App. xxix-xxxii.

3. A unanimous panel of the court of appeals affirmed petitioners' convictions. Pet. App. i-xxxii. The court rejected petitioners' claim that they were immune from prosecution for offenses committed in the course of their employment by the federal government. *Id.* at viii-xi. It reasoned that petitioners are "persons" subject to prosecution under Section 3008(d) of RCRA, 42 U.S.C. 6928(d), because they

were charged in their individual capacities and Section 1004(15) of RCRA, 42 U.S.C. 6903(15), expressly includes individuals in the definition of "persons." Pet. App. viii-ix. The court also rejected petitioners' argument that they did not "knowingly" commit the crimes because there was insufficient evidence that they knew violation of RCRA was a crime. *Id.* at xi-xvii. That contention, the court held, conflicts with "the familiar principle that 'ignorance of the law is no defense.'" *Id.* at xii (quoting *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).[2]

ARGUMENT

The court of appeals correctly rejected petitioners' challenges to their convictions. Federal employees are not insulated from prosecution for criminal violations of RCRA. In addition, consistent with the principle that ignorance of the law is no excuse, Section 3008 (d)(2)(A) of RCRA does not require proof that the defendant knew that his conduct was a crime. Neither of these holdings below conflicts with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

1. Petitioners argue (Pet. 28-47) that they are immune from prosecution for violations of Section 3008

[2] The court of appeals held that Section 3008(d)(2)(A) does require knowledge that the wastes in question are hazardous and agreed with petitioners that the jury instructions on this issue were inadequate, but it found the error harmless in light of the "overwhelming evidence that defendants were aware they were dealing with hazardous chemicals." Pet. App. xiv-xvi. Petitioners do not renew their challenge to those instructions here. The court of appeals also rejected several other arguments that petitioners likewise do not renew. *Id.* at xvi n.8, xvii-xxxii.

(d)(2)(A) of RCRA committed in the course of their work. The text of RCRA, however, makes clear that petitioners are subject to criminal prosecution, and no judicially fashioned principles of immunity remove them from RCRA's coverage.

a. Section 3008(d)(2)(A) of RCRA provides that "[a]ny person" who knowingly treats, stores or disposes of any hazardous waste without a permit issued under RCRA shall be subject to criminal penalties. 42 U.S.C. 6928(d)(2)(A). Section 1004(15) of RCRA defines the term "person" to mean "an *individual*, trust, firm, joint stock company, corporation * * *, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. 6903(15) (emphasis added). Petitioners are "individuals," and they therefore are "persons" subject to criminal prosecution under Section 3008(d)(2)(A). Nothing in these all-encompassing provisions suggests that individuals who happen to be employed by the United States are exempt from criminal liability. To the contrary, Section 3008(d) states that "[*a*]*ny* person"—and therefore *any* "individual"—who commits a proscribed act is subject to criminal liabiilty. Compare *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, No. 89-1452 (Jan. 8, 1991), slip op. 10 (giving all-encompassing effect to term "any"); *United States* v. *Monsanto*, 109 S. Ct. 2657, 2662 (1989).

Petitioners contend (Pet. 30-35) that because the definition of "person" in Section 1004(15) does not include a federal agency—and because a federal agency therefore is not subject to criminal prosecution under Section 3008(d)—employees of a federal agency must also be exempt from prosecution. As the court of appeals observed, however, petitioners "were

indicted, tried, and convicted as individuals, not as agents of the government." Pet. App. at ix. As individuals, they clearly are subject to criminal liability under Section 3008(d). The liability of an individual employee is independent of any liability to which his employer may be subject. Cf. *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 745 (8th Cir. 1986) (corporate employees are "individuals"), cert. denied, 484 U.S. 848 (1987). Moreover, the fact that Congress omitted federal agencies from the definition of the term "person" in Section 1004(15), while including all "individual[s]" without any parallel exclusion of federal employees, reinforces the conclusion that federal employees do not fall outside the category of "persons" who are subject to criminal liability.[3]

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[3] Petitioners seek (Pet. 35-36) support for their view of the criminal liability of federal employees in proposed amendments to RCRA that were approved by the House of Representatives, but not the Senate, during the last Congress. See H.R. 1056, 101st Cong., 1st Sess. (1989). Section 2 of that bill would have amended Section 6001 to provide that "[a]n agent, employee, or officer of the United States shall be subject to any criminal sanction * * * under any Federal or State solid or hazardous waste law," Pet. App. xxxix-xl, and Section 3 would have added a new Section 6005 to RCRA to define the term "person" to include a federal agency. Pet. App. xl.

Petitioners speculate (Pet. 36) that the authors of this proposal must have shared their view "that RCRA in its present form does not authorize criminal prosecutions against federal employees." The views of Members of a subsequent Congress are not a reliable source of guidance in interpreting an Act of Congress. See, *e.g.*, *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2665 n.8 (1990); *United States* v. *Mine Workers*, 330 U.S. 258, 281-282 (1947). In any event, petitioners' speculation in this case about the views of the House of Representatives in the last Congress is incorrect, because the back-

b. Petitioners rely (Pet. 36-47) on principles of immunity that protect federal employees in quite distinct settings, such as criminal or civil actions under *state* law. Those judicially fashioned principles do not override the terms of a federal statute that subjects federal employees to criminal liability.

As an initial matter, petitioners' reliance (Pet. 37-43) on the doctrine of *sovereign* immunity is misplaced. We agree with petitioners that, absent congressional consent, sovereign immunity protects the United States and its agencies from suit and civil penalties—and, of course, from criminal penalties. And sovereign immunity also bars a suit against a federal officer or employee in his official capacity, where relief would run against the government itself. See, *e.g.*, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 112-116 (1984); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949); cf. *Brandon* v. *Holt*, 469 U.S. 464, 472-473 (1985). But sovereign immunity does not bar a civil suit or criminal prosecution against a federal employee in his *individual* capacity, where the relief or

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ground of H.R. 1056 makes clear that it was not intended to change existing law with respect to the criminal liability of federal employees. The House Report, for example, stated: "Individual employees shall *continue* to be held responsible for criminal acts, but no federal department, agency, or instrumentality shall be subject to criminal sanctions." H.R. Rep. No. 141, 101st Cong., 1st Sess. 46 (1989) (emphasis added). See also *id.* at 47 n.1 (Justice Department letter stating that bill's provision expressly subjecting federal employees to criminal liability is unnecessary because they already are covered by RCRA's definition of "person"); 135 Cong. Rec. H3894 (daily ed. July 19, 1989) (remarks of Rep. Luken) (H.R. 1056 "retains the current law which allows prosecution of Federal employees for criminal violations").

sanction would not run against the government itself.

For the foregoing reasons, petitioners' claim of exemption from criminal prosecution is based on principles of *official*, not sovereign, immunity. Where it applies, official immunity does protect federal and state officers from actions brought against them in their individual capacities. Contrary to petitioners' assertion, however, there is no presumption that federal employees enjoy official immunity from prosecution for federal crimes committed within the scope of their federal employment.

In *Gravel* v. *United States*, 408 U.S. 606 (1972), a United States Senator sought to quash a subpoena directing his assistant to appear before a grand jury investigating the publication of the Pentagon Papers. The Senator argued that questioning of his assistant should be strictly limited by the Speech or Debate Clause (U.S. Const. Art. I, § 6) and a common-law privilege protecting the legislative process. The Court held that questioning of the Senator's aide was forbidden under the Clause only insofar as it concerned legislative acts, such as preparation for and conduct at a subcommittee meeting. The Court reasoned that the purpose of the Clause—to free legislators "from executive and judicial oversight that realistically threatens" their independence—does not require immunity from criminal prosecution for all acts that Senators perform "in their official capacity as Senators." 408 U.S. at 618, 624-625. Significantly, the Court also rejected the argument for a nonconstitutional, judicially created immunity, stating that it would not "carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress." *Id.* at 627; see also

United States v. *Brewster*, 408 U.S. 501, 507-529 (1972) (Speech or Debate Clause does not immunize Senator from prosecution for accepting a bribe to influence his official actions).

A similar reluctance to insulate public officials from accountability under the criminal law is also evident in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). There, the Court observed that although a state judge would enjoy absolute immunity from civil liability in a civil-rights action arising out of his judicial duties, the absence of immunity from criminal prosecution would furnish an important check against misuse of office. The Court explained that it had "never held that the performance of the duties of judicial, legislative or executive officers requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." 414 U.S. at 503. Two years later, in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), the Court observed that although state prosecutors are protected by absolute immunity under 42 U.S.C. 1983, "[t]his Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law." 424 U.S. at 429; accord, *Mesa* v. *California*, 489 U.S. 121, 133 (1989). Similarly, in *United States* v. *Gillock*, 445 U.S. 360 (1980), the Court held that state legislators are not immune from federal criminal prosecution, even though they had been held to be immune from a private civil action under federal law.

The courts of appeals have reached similar conclusions. In *United States* v. *Diggs*, 613 F.2d 988, 1001 (1979), cert. denied, 446 U.S. 982 (1980), the D.C. Circuit held that a United States Representative could be prosecuted for offenses committed in the administration of his congressional office, "provided

that the government's case does not intrude into legislative processes or functions." And arguments by federal judges that they are immune from federal criminal prosecution were rejected in *United States* v. *Claiborne*, 765 F.2d 784, 789-790 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); *United States* v. *Hastings*, 681 F.2d 706, 710-712 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); and *United States* v. *Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

Petitioners' claim of immunity is weaker than those rejected in the foregoing cases, because petitioners did not occupy positions singled out by the Constitution or common law for special protection from civil suits. As chemical engineers who supervised research that generated substantial quantities of hazardous waste, petitioners' day-to-day tasks were functionally no different from those performed by their counterparts in private industry. Because the federal government is not exempt from RCRA's regulation of hazardous waste, petitioners have a duty under federal law to conform their official conduct to the substantive requirements of RCRA. Nor does this prosecution raise the federalism or separation-of-powers concerns that have shaped immunity doctrines in other contexts, since petitioners were employees of and were prosecuted by the Executive Branch.[4]

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[4] The discussion in the text demonstrates why petitioners err in relying (Pet. 37-46) on four inapposite lines of cases: (1) decisions concerning federal officials' immunity to civil suits for money damages (Pet. 37, 45-46, citing *Scherer* v. *Morrow*, 401 F.2d 204 (7th Cir. 1968), cert. denied, 393 U.S. 1084 (1969), and *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)); (2) decisions granting habeas corpus relief to federal officials held for

2. Petitioners' argument (Pet. 37-38) that Section 6001 of RCRA, 42 U.S.C. 6961, supports their claim of immunity is meritless. Section 6001 subjects federal agencies, including CRDEC, to all federal and state "requirements, both substantive and procedural * * *, respecting control and abatement of solid waste or hazardous waste disposal." This provision obligated petitioners, as agents of CRDEC, to respect the requirements of RCRA. Petitioners therefore cannot claim immunity on the ground that the substantive law they are charged with violating is preempted or otherwise inapplicable to their conduct. Compare *Mesa* v. *California*, 489 U.S. at 126-127; *In re Neagle*, 135 U.S. 1, 75 (1890).

To be sure, the courts of appeals that have addressed the issue have held that the waiver of *sovereign* immunity in Section 6001 stops short of subjecting federal agencies to criminal or civil penalties imposed under state law. *California* v. *Walters*, 751 F.2d 977 (9th Cir. 1985); *United States* v. *Washing-*

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criminal prosecution under *state* law for actions within the scope of their federal employment (Pet. 32, 46, citing *In re Neagle*, 135 U.S. 1 (1890), and *Morgan* v. *California*, 743 F.2d 728 (9th Cir. 1984)); (3) decisions dismissing suits against federal officials where the relief sought would effectively enjoin a federal agency (Pet. 45, citing *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *United States* v. *Yakima Tribal Court*, 794 F.2d 1402, 1407 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987)); and (4) this Court's holding that the Eleventh Amendment bars federal courts from entertaining state-law claims for injunctive relief against state officials (Pet. 37, citing *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)). None of those cases supports a claim of immunity from *criminal* prosecution under a *federal* law that does not exclude federal employees from its generally applicable provisions.

ton, 872 F.2d 874, 878-879 (9th Cir. 1989); *Mitzelfelt* v. *United States*, 903 F.2d 1293, 1294-1295 (10th Cir. 1990); *Ohio* v. *U.S. Department of Energy*, 904 F.2d 1058, 1062-1064 (6th Cir. 1990).[5] None of those cases, however, suggests that the limitations on the waiver of sovereign immunity affect the personal liability under federal law of individuals employed by federal agencies. *California* v. *Walters*, on which petitioners principally rely (Pet. 38), held that Section 6001 does not waive sovereign immunity to a state criminal prosecution for violations of state restrictions on disposal of infectious wastes at a Veterans Administration hospital. The analysis of Section 6001 in *Walters* was expressly predicated on the parties' agreement that California's prosecution was "essentially against the United States," rather than the named officials as individuals. 751 F.2d at 979. Here, by contrast, the prosecution was brought by the United States, and was

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[5] But see *Maine* v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 91-1064 (1st Cir.). In *Ohio* v. *U.S. Department of Energy*, the Sixth Circuit held that although Section 6001 does not subject a federal agency to civil penalties, the citizen-suit provision of RCRA, Section 7002, 42 U.S.C. 6972, does accomplish that result. 904 F.2d at 1064-1065. (The Sixth Circuit also held that the Clean Water Act, 33 U.S.C. 1251 *et seq.*, waives the federal government's immunity to civil penalties under a state's water pollution laws. 904 F.2d at 1060-1062.) The Solicitor General has authorized the filing of a petition for a writ of certiorari to review the decision in *Ohio* v. *U.S. Department of Energy*, and the petition is due on February 22, 1991. Because the question of a federal agency's liability for civil penalties under Section 7002 of RCRA, presented in the *Ohio* case, is wholly distinct from the question of personal liability for criminal sanctions under Section 3008(d), presented here, there is no reason to hold the petition in this case pending the disposition of *Ohio* v. *U.S. Department of Energy*.

brought against petitioners as individuals. Nothing in Section 6001 contradicts RCRA's clear statement that such "individuals" are "persons" under Section 1004(15), and are therefore subject to criminal penalties under Section 3008(d)(2).

2. Petitioners also contend (Pet. 47-61) that the court of appeals erred in finding that the requisite "criminal intent" was established here. Section 3008 (d)(2) of RCRA, 42 U.S.C. 6928(d)(2), prescribes criminal penalties for any person who—

> knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—
>
> (A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C. 1411 et seq.]; or
>
> (B) in knowing violation of any material condition or requirement of such permit; or
>
> (C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards.

Two prior decisions under Section 3008(d)(2)(A) have divided on the question whether the government must prove that the defendant knew a permit was lacking. Compare *United States* v. *Hoflin*, 880 F.2d 1033, 1037 (9th Cir. 1989) (government need not establish knowledge that there was no permit), cert. denied, 110 S. Ct. 1143 (1990), with *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662, 668-670 (3d Cir. 1984) (jury must find that defendant was aware of both the permit requirement and the absence of a permit), cert. denied, 469 U.S. 1208 (1985). Although petitioners discuss (Pet. 53-55) *Johnson & Towers*, they do not join this precise dis-

pute, since they do not argue that their convictions should be reversed because the jury was not instructed that conviction required proof of knowledge that a permit was required but was lacking. And with good reason: the record shows that petitioners had considerable knowledge of the applicable regulatory requirements for handling hazardous wastes,[6] and petitioners concede (Pet. 60) that they "indeed were well aware of the APG regulations dealing with hazardous wastes." Nor did the court of appeals address the question decided in *Hoflin* and *Johnson & Towers*. In any event, this Court recently denied certiorari in *Hoflin*, which directly raised the

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[6] In early 1984, Dee received three memoranda from the Chief of CRDEC's Environmental Technology Division expressing concern that the hazardous waste inventory control and disposal procedures described in APG 200-1 and CRDC 710-1 (see page 3, *supra*) were not being complied with at CRDEC. Those memoranda included (1) directions to laboratory supervisors to review and comply with inventory and disposal requirements or "risk regulatory enforcement and controversy," C.A. App. 1221; (2) a warning that wastes covered by RCRA "must be disposed of under manifest to ensure RCRA compliance," *id.* at 1275; and (3) a directive (which included a list of RCRA hazardous substances) that Dee submit a list of hazardous wastes and estimated quantities generated by Pilot Plant operations, *id.* at 1295-1298. In reply to the first memorandum, which had been routed to him by Dee, Lentz represented that the regulations and operating procedures "were reviewed as requested," and attested that "[c]ompliance and implementation of the procedures are being complied with at [the Pilot Plant]." C.A. Supp. App. 489. Gepp drafted and signed off on Lentz's response to the first memorandum. *Id.* at 174-176. Gepp also responded to the request for a list of hazardous wastes generated at the Pilot Plant, falsely stating that the only RCRA hazardous waste generated by the Pilot Plant was o-cresol. C.A. App. 1294.

issue whether knowledge of the permit requirement and absence of a permit must be shown. There would be no reason for a different disposition here—even if petitioners did seek review on that issue and the court below had decided it.[7]

Petitioners instead argue for reversal of their convictions based on an asserted lack of evidence that they knew their violations entailed a risk of criminal sanctions. See Pet. 10-11, 60. The court of appeals correctly rejected that contention. Pet. App. xi-xvii.[8]

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[7] For the reasons stated in our brief in opposition in *Hoflin* (a copy of which we are furnishing to petitioners here), the Ninth Circuit correctly held in that case that the government need not show that the defendant knew that a permit was required but was lacking. The text of the statute establishes as much: although paragraphs (B) and (C) of Section 3008(d)(2) impose criminal penalties for conduct "in knowing violation" of a permit condition or certain regulations or standards, paragraph (A) imposes no similar requirement of knowledge that the treatment, storage, or disposal was without a permit.

[8] In the district court, petitioners proposed an instruction stating (C.A. App. 1407):

> It is not necessary for the prosecution to prove that a Defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with a specific intent, as charged.

This proposed instruction is inconsistent with petitioners' subsequent argument that the government must show that they knew their conduct was a crime. Hence, although the government did not raise the point below, the court of appeals could have rejected that argument on the ground that it had been waived. Fed. R. Crim. P. 30.

It is a firmly rooted principle of criminal law that knowledge that the conduct in question is a crime is not an element of a criminal offense; it is in this respect that the maxim that "ignorance of the law is no excuse" carries particular force. Model Penal Code § 2.02(9) & n. (9) (1985); see, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 425 n.9 (1985) ("It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7 U.S.C.] § 2024(b)(1) violation that one did not know possessing food stamps in a manner unauthorized by statute or regulations was illegal.").

Nothing in the text or purposes of Section 3008(d) of RCRA suggests that it departs from the established rule that the prosecution need not show that the defendant knew his conduct was a crime. Indeed, Section 3008(d)(2)(A) is an especially unlikely candidate for such a novel rule. Under statutes involving highly regulated activities, this Court has held that the prosecution need not even prove knowledge of the regulatory requirements of the law, much less knowledge that failure to adhere to those requirements is a criminal offense. For example, in *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558 (1971), the Court affirmed a conviction for violation of routing restrictions for trucks carrying dangerous cargoes. The statute at issue provided criminal sanctions for anyone who "knowingly violate[d] any regulation issued by the Interstate Commerce Commission." 18 U.S.C. 834(f). The Court read the term "knowingly" to indicate only that the crime was not a strict liability offense, and it found the knowledge element satisfied by a showing that the defendant knew that it was shipping a dangerous substance, rather than a harm-

less one. 402 U.S. at 563-564. This interpretation did not signal "an exception to the rule that ignorance of the law is no excuse" and was consistent with a general view that "where dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that any one who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 563, 565. Accord *United States* v. *Freed*, 401 U.S. 601, 607-610 (1971); *United States* v. *Balint*, 258 U.S. 250, 257 (1922).[9]

Petitioners contend (Pet. 48, 52-55) that the court below failed to acknowledge the more restrictive reading of the knowledge element of Section 3008 (d)(2)(A) in *Johnson & Towers*, 741 F.2d at 668-670. As we have explained (see page 16, *supra*), however, *Johnson & Towers* held only that in a prosecution under Section 3008(d)(2)(A), the government must show that the defendant knew both that a permit was required and that no permit had been obtained. 741 F.2d at 669-770. This holding stops far short of petitioners' position that the government must also establish that the defendant knew that his conduct was punishable as a criminal offense. In fact, *Johnson & Towers* quoted language

[9] The decision below also is consistent with decisions construing other criminal provisions of RCRA. See *United States* v. *Hayes Int'l Corp.*, 786 F.2d 1499, 1502-1503 (11th Cir. 1986) (government need not prove knowledge of illegality for conviction under 42 U.S.C. 6928(d)(1) for knowing transportation of waste to an unpermitted facility); *United States* v. *Protex Indus., Inc.*, 874 F.2d 740, 744 (10th Cir. 1989) ("knowing endangerment" offense, 42 U.S.C. 6928(e), requires proof only that defendant violated RCRA and knew that its actions placed others in great danger).

in *International Minerals* that is antithetical to petitioners' position, including its invocation of the maxim that "ignorance of the law is no excuse." 741 F.2d at 669 (quoting 402 U.S. at 563). The Fourth Circuit in this case cited that part of the *Johnson & Towers* opinion in rejecting petitioners' attempt to expand the knowledge element in Section 3008 (d)(2)(A) beyond the scope it was given in *Johnson & Towers*. See Pet. App. xiii.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners Dee and Lenz also argue (Pet. 61) that their convictions should be reversed because the improper storage of chemicals at the Old Pilot Plant predated their employment at CRDEC and because a person cannot, in their view, "inherit" an environmental crime. This argument, as the court of appeals noted, "borders on the frivolous." Pet. App. at xxxi. Count Four charged Dee and Lentz with improper storage of hazardous wastes between June 1983 and August 1986. The existence of environmental problems at the Old Pilot Plant when Dee and Lentz assumed control does not diminish their culpability for their subsequent failure, over an extended period of time, to comply with RCRA.

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